Supreme Court, U.S.
FILED
991606 APR 4 - 2000
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

DARCI KAYLEEN PIERCE,
Petitioner,

v.

PENNY LUCERO, Warden,
ATTORNEY GENERAL FOR THE
STATE OF NEW MEXICO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When is it appropriate for a federal habeas court to accept a state court's conclusions without independently reviewing the state court record?

2. Whether the trial court's failure to instruct the jury on an essential and disputed element of a charge may constitute harmless error on federal habeas if the reviewing court otherwise finds the evidence is sufficient to support a conviction?

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PETITION FOR A WRIT OF CERTIORARI

Darci Kayleen Pierce petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, attached as Appendix A (App. 1a-12a), which is unpublished, was filed on December 6, 1999. The district court's judgment and order, attached as Appendix B (App. 13a-14a), are unreported. The magistrate's proposed findings and recommended disposition are attached as Appendix C (App. 15a-38a).

JURISDICTION

On December 6, 1999, the Tenth Circuit Court of Appeals filed its order and judgment denying Ms. Pierce's application for a certificate of appealability and affirming the district court's dismissal with prejudice of her petition for a writ of habeas corpus. The Tenth Circuit denied her petition for rehearing on January 6, 2000. Pursuant to Supreme Court Rule 13 and 28 U.S.C. § 2101(c), this petition is timely filed on or before April 5, 2000.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The federal constitutional provision involved in this case is the Fourteenth Amendment, which provides in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

The statutory provision involved in this case is 28 U.S.C. §2254(d), which provides in relevant part:

> An application for writ of *habeas corpus* . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

STATEMENT OF THE CASE

The Procedural History

On August 6, 1987, a state grand jury indicted Ms. Pierce for first degree murder (willful and deliberate), or, in the alternative, first degree felony murder, kidnaping, and child abuse. Ms. Pierce raised an insanity defense at trial. Ms. Pierce's trial lasted from March 7 to March 29, 1988. On March 29, 1988, the jury returned a verdict of guilty but mentally ill ("GBMI") on all three counts, without differentiating between the two possible theories for first degree

murder. The state district court then sentenced Ms. Pierce to life imprisonment for the first degree murder conviction, eighteen years for kidnaping and eighteen months for child abuse with all three sentences to run concurrently.

On direct appeal, Ms. Pierce, *inter alia,* challenged the trial court's failure to properly instruct the jury on the *mens rea* requirement for felony murder beyond the *mens rea* required for the underlying felony. On February 27, 1990, the New Mexico Supreme Court affirmed her conviction.

The following year, in *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991), the New Mexico Supreme Court held that the New Mexico felony murder statute, under which Ms. Pierce had been prosecuted, required "proof that the defendant intended to kill," or "knew that [her] actions created a strong probability of death or great bodily harm." The *Ortega* court explained that it was construing what the state's felony murder statute had meant since its inception. *Id.* at 562-66, 817 P.2d at 1204-08.

On April 10, 1997, Ms. Pierce filed a petition for a writ of habeas corpus in New Mexico's Second Judicial District. The issues Ms. Pierce raised in that petition included the trial court's failure to instruct on the essential *mens rea* element of felony murder and ineffective assistance of trial counsel.

The state district court held an evidentiary hearing, lasting over a five day period, on the ineffective assistance of counsel issue. Then on May 4, 1998, the state district court denied Ms. Pierce's habeas petition. (App. 41a-50a). On that same date, Ms. Pierce petitioned the New Mexico Supreme Court for a writ of certiorari. On June 24, 1998, the New Mexico Supreme Court denied that petition. (App. 39a-40a).

On July 2, 1998, Ms. Pierce filed a petition for a writ of habeas corpus in the United States District Court for the District of New Mexico. Without ordering or reviewing the state court record, on May 17, 1999, the magistrate issued proposed findings and a recommended disposition. (App. 15a-38a). Ms. Pierce filed objections to those proposed findings. On June 10, 1999, the district court issued an order adopting the findings of the magistrate and dismissing Ms. Pierce's petition with prejudice. (App. 13a-14a). The district court refused to issue a certificate of appealability.

Ms. Pierce then appealed the district court's order to the United States Court of Appeals for the Tenth Circuit and applied for a certificate of appealability. The issues she raised included the trial court's failure to instruct the jury on an essential element of the offense of felony murder and the district court's failure to order or review the state court record.

On December 6, 1999, the Tenth Circuit denied Ms. Pierce's application for a certificate of appealability and dismissed her appeal. Ms. Pierce filed a petition for rehearing, which that court denied on January 6, 2000.

The Facts

On July 23, 1987, nineteen-year-old Darci Pierce (who had no prior criminal arrests or convictions) went to the OB/GYN Clinic at Kirkland Air Force Base. Ms. Pierce's husband and family believed her to be nine months pregnant. Apparently, Ms. Pierce was experiencing pseudocyesis, a condition of false pregnancy which caused Ms. Pierce to gain extensive weight and to exhibit many other signs of pregnancy. This condition had been apparent since at least December of 1986.

After spending hours in the clinic's parking lot, Ms. Pierce encountered Cindy Ray, a patient at the clinic who was eight months pregnant. Ms. Pierce convinced Mrs. Ray to get into Ms. Pierce's car. She then apparently drove away from the clinic to an area south of Tijeras, New Mexico, where she pulled onto a forest road. At some point after stopping the car, Ms. Pierce strangled Mrs. Ray into unconsciousness. Ms. Pierce then removed the child from Mrs. Ray's womb by performing a caesarean procedure using Mrs. Ray's car keys. Mrs. Ray died from blood loss combined with the effect of the partial strangulation. The child was uninjured.

Ms. Pierce took the baby, drove to a car dealership in Albuquerque, and informed the employees of the dealership that she had given birth alongside the road. They called an ambulance to take her and the baby to the hospital. After her arrival at the hospital, the medical staff determined that Ms. Pierce had not recently given birth and, indeed, had not even been pregnant. Eventually, the police determined that the child was Mrs. Ray's.

At trial, Ms. Pierce pled not guilty by reason of insanity. Given the facts of the case and Ms. Pierce's insanity defense, the critical question at trial was Ms. Pierce's mental condition at the time of the offense. Six expert witnesses testified about her mental condition giving the jury conflicting descriptions and diagnoses.

During the trial, the state presented two alternative theories for first degree murder: (1) willful, premeditated murder and (2) felony murder. The jury was not asked to differentiate between these two theories when returning a verdict. In addition, the trial court instructed the jury over Ms. Pierce's objection that the only *mens rea* required to convict her of felony murder was the *mens rea* element of the underlying

felony of kidnaping. Defense counsel objected that the felony murder theory, if presented to the jury, would improperly remove the issue of Ms. Pierce's intent at the time of the murder which was crucial in the case.

During deliberations, the jurors asked the court if they could distinguish between felony murder and murder in the first degree. The court responded that because felony murder was first degree murder no distinction was needed. The jury then returned a verdict of GBMI without differentiating between the two theories presented by the state.

The focus of the state habeas evidentiary hearing was on Ms. Pierce's claim that her trial counsel had been ineffective. The evidence at that hearing established that Ms. Pierce had been adopted at eleven days of age. Although her adoptive family had given defense counsel information about how to contact Ms. Pierce's biological mother, counsel made no effort to locate Ms. Pierce's biological family.

What defense counsel would have discovered if they had investigated Ms. Pierce's biological family was that her family had at least a three-generational history of mental illness, including schizophrenia, which has been shown to be inheritable. Indeed, her maternal great-grandfather had spent approximately thirty-seven years institutionalized with a diagnosis of "dementia praecox" (now called schizophrenia).

In the federal habeas proceedings, respondents conceded that Ms. Pierce had exhausted all state court remedies and attached to the answer exhaustion materials, which included the pleadings filed during her direct appeal and state habeas proceeding.

The magistrate found he could decide the issues raised without reviewing the state court record of either the trial or the

evidentiary hearing held on her state habeas petition. He determined that Ms. Pierce had "not shown that the state courts' adjudications of her claims were inappropriate or incorrect under 28 U.S.C. § 2254(d)." (App. 23a).

Ms. Pierce objected to the magistrate's proposed findings. She argued that her claims could not be dismissed without an examination of the state court record. In particular, she pointed out that the court could not evaluate the impact of the trial court's failure to instruct the jury on the essential *mens rea* element for felony murder without reviewing the trial transcript. She also explained that the court could not conduct a meaningful review of the state court ruling on her ineffective assistance of counsel claim without reviewing the trial transcript as well as the transcript from the state habeas evidentiary hearing. Ms. Pierce attached copies of specific portions of these transcripts to her objections to demonstrate the importance of reviewing the complete state court record

The district court adopted the findings and dismissed Ms. Pierce's petition with prejudice. (App. 13a-14a). Ms. Pierce offered essentially the same arguments she had made in the district court to the Tenth Circuit. The Tenth Circuit denied Ms. Pierce's certificate of appealability, finding that "[b]ecause the federal district court could analyze Pierce's claims on the facts presented, it did not err in refusing to review the whole trial transcript." (App. 4a-5a).

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S UPHOLDING THE DISTRICT COURT'S DISMISSAL OF THIS HABEAS PETITION WITHOUT REVIEWING THE STATE COURT RECORD CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

By upholding the district court's summary dismissal of Ms. Pierce's federal habeas petition without reviewing the state court record, the Tenth Circuit sanctioned an egregious abandonment of the federal court's role in federal habeas corpus proceedings -- to ensure that the state has honored a criminal defendant's federal constitutional rights. Federal courts, including the Tenth Circuit, have consistently decried the kind of acquiescence to state court decision making accorded by the district court in this case. The district court neglected its duty as a federal habeas court to review independently the state court record to assure itself that the record supported the state courts' decisions. The Tenth Circuit's affirmance of that indifference warrants this Court's intervention to correct this extreme departure from the proper role of a federal habeas court and to establish the parameters for the lower courts as to when it is appropriate for a federal habeas court to reject a claim without reviewing the state court record.

Whatever the standard of review of state court decisions the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C.A. § 2241 et seq., created, that Act has not changed federal constitutional law. As shown below, that law required the district court's independent examination of the state court

record as a whole to decide the issues Ms. Pierce presented. A federal court may not abdicate its responsibility "to make an independent determination that due process has been observed in the factual and legal support for state adjudications." *Maes v. Patterson*, 401 F.2d 200, 201 (10th Cir. 1968).

Under any interpretation of AEDPA's standards of review established under 28 U.S.C. § 2254(d), a federal habeas court continues to retain the obligation to examine whether the state record supports the state court decision. For example, as provided in 28 U.S.C. § 2254(d)(1), the district court must determine whether the state court's decision "is contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." As demonstrated below, with respect to the grounds Ms. Pierce has raised, the district court was required to assess the state court record as a whole before it could decide if the state court's decision "[was] contrary to, or involved an unreasonable application of" federal constitutional law.

With respect to mixed questions of fact and law, to determine whether the state court decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(2), the federal habeas court must review the state court's application of the law to the facts. *O'Brien v. Dubois*, 145 F.3d 16, 24-26 (1st Cir. 1998); *Green v. French*, 143 F.3d 865, 869-75 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999); *Neelley v. Nagle*, 138 F.3d 917, 923-25 (11th Cir. 1998), *cert. denied*, 525 U.S. 1075 (1999); *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998); *Drinkard v. Johnson*, 97 F.3d 751, 768-69 (5th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856, 870-71 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997); *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). Such a review necessarily entails the federal court analyzing the issue in light

of the state court record to discern whether the state court decision constitutes a reasonable application of federal law. *See Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997) (it is impossible to determine whether the state court adjudication regarding sufficiency of the evidence rested on an "unreasonable application" of clearly established federal law without reviewing the record); *see also Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999) ("[W]e must uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us that its result contravenes or unreasonably applies clearly established federal law or is based on an unreasonable determination of the facts in light of the evidence presented.").

In this case Ms. Pierce raised issues of an omitted element from a jury instruction and ineffective assistance of counsel. Those issues required the district court to evaluate the trial record as well as the transcript from the state habeas hearing to determine the existence, scope, and harm of each alleged error. For example, in habeas review the appropriate standard for evaluating whether omitting an element from a jury instruction warrants granting the petition is whether the error had a substantial and injurious effect or influence on the jury's verdict. *See California v. Roy*, 519 U.S. 2, 5 (1996) (*quoting Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)). This Court has made clear that a court must consider the effect of such an error on the jury's verdict "in the whole context of a particular case." *Calderon v. Coleman*, 525 U.S. 141, 147 (1998); *see also Vicks v. Bunnell*, 875 F. 2d 258, 259 (9th Cir. 1989) ("[B]efore a district court can determine whether a constitutional error is harmless, it must review the entire state court record and . . . if . . .the entire record is not supplied by the parties, the district court has a duty to obtain that record itself.") (internal brackets omitted). Without complete review of the record, the court is not able to determine either the

context of the error or if the state court decision rested on an "unreasonable application" of clearly established federal law.

Ms. Pierce is also entitled to relief if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). To determine whether this is so, a federal court must review the record of "the evidence presented in the State court proceeding." *See Bundy v. Dugger*, 816 F.2d 564, 566 (11th Cir. 1987) (improper to rely on state court factual finding without reviewing the state court record to determine whether the finding was supported by the evidence); *United States ex rel. Ballard v. Bengston*, 702 F.2d 656, 663 (7th Cir. 1983) (similar).

Thus, in considering a habeas corpus petition, the district court "is required to 'make its determination as to the sufficiency of the state court findings from an independent review of the record, or otherwise grant a hearing and make its own findings on the merits.'" *Jones*, 114 F.3d at 1008 (*quoting Richmond v. Ricketts*, 774 F.2d 957, 961 (9th Cir. 1985)) ("the district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by [either standard of review mandated] by the AEDPA"). *See also Cooks v. Ward*, 165 F.3d 1283, 1288 (10th Cir.), *cert. denied*, 120 S. Ct. 94 (1999) (standard for review of factual findings in habeas proceeding requires an independent review of entire record and totality of circumstances).

Since the AEDPA went into effect, federal habeas courts have taken precisely that approach. They examine the relevant portions of the state court records, conduct their own evaluation of the issues with respect to those records, and only then decide whether the state courts' resolutions of those issues were reasonable. *See, e.g., O'Brien*, 145 F.3d at 24-26; *Green*, 143

F.3d at 868-73; *Harpster*, 128 F.3d at 327-30; *Nobles v. Johnson*, 127 F.3d 409, 418-19 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998).

The district court here was not free to skip every step but the reasonableness determination. It is "beyond peradventure that Congress did not intend to strip federal courts of their authority independently to assess the merits of federal questions raised in habeas petitions." *O'Brien*, 145 F.3d at 22. The district court's approach, as affirmed by the Tenth Circuit, renders the federal habeas corpus statute meaningless. Under that approach, a federal habeas petitioner must be denied relief if the state courts provide constitutional window dressing no matter how egregious and obvious the constitutional violation in reality. For these reasons, this Court should grant certiorari to address this issue.

II. THE TENTH CIRCUIT'S UPHOLDING THE DISTRICT COURT'S DISMISSAL OF MS. PIERCE'S CLAIM THAT HER DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE ESSENTIAL *MENS REA* ELEMENT OF FELONY MURDER CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every act necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A court's failure to instruct a jury on an essential element of a charge offense violates due process. *Osborne v. Ohio*, 495 U.S. 103, 122-23 & n. 17, 125 (1990);

Jackson v. Virginia, 443 U.S. 307, 316 (1979); *see also United States v. Gaudin*, 515 U.S. 506, 513-14 (1995).

When reviewing whether an erroneous jury instruction in state court mandates federal habeas relief, a federal court must determine "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also California v. Roy*, 519 U.S. 2, 5 (1996) (*Brecht* "harmless error" standard applies on habeas review to error arising from omission of an essential element from jury instruction).

Brecht does not permit denying a petitioner's habeas petition on a finding that sufficient evidence exists to support the verdict. As Justice Stevens stated in his concurrence in *Brecht*, the *Kotteakos* standard, although more forgiving of errors than the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), is still a "demanding" standard. 507 U.S. at 641 (Stevens, J., concurring). *Kotteakos* requires that the error be evaluated in the context of the entire trial record. *Id.*; *Kotteakos*, 328 U.S. at 762, 764. In determining whether the error is harmless the "inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Kotteakos*, 328 U.S. at 765. Nor can the court ask only whether it thinks the defendant would have been convicted even if the error had not taken place. *Brecht*, 507 U.S. at 642 (Stevens, J., concurring). Rather a defendant is entitled to relief "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error. . . ." *Kotteakos*, 328 U.S. at 765. In a federal habeas case, if a judge has a grave doubt about whether an error affected a jury in this way, the judge must treat the error as if it

did. *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995). In other words, the burden is on the respondents to prove harmlessness under the *Kotteakos* standard. *Id.* at 437-45.

In this case, on direct appeal, Ms. Pierce unsuccessfully challenged the trial court's failure to properly instruct on the *mens rea* requirement for felony murder beyond the *mens rea* required for the underlying felony. *See State v. Pierce*, 109 N.M. 596, 788 P.2d 352 (1990). The following year, the New Mexico Supreme Court held that the New Mexico felony murder statute, under which Ms. Pierce had been prosecuted, required "proof that the defendant intended to kill," or "knew that [her] actions created a strong probability of death or great bodily harm." *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991).

The *Ortega* court explained that it was not creating new law but rather was construing what the state's felony murder statute had meant since its adoption. *Id.* at 562-66, 817 P.2d at 1204-08. As a result, this *mens rea* was an essential element of the crime of felony murder at the time of Ms. Pierce's trial. Thus, the trial court failed to instruct Ms. Pierce's jury regarding an essential element of felony murder, i.e., that she must have had an "intent to kill" or "knowledge that her actions created a strong probability of death or great bodily harm."

The New Mexico Supreme Court in *Ortega* made clear that its ruling would apply to Ms. Pierce by specifically addressing what it viewed as the impact of its decision on Ms. Pierce's case. *Id.* at 563-64, 817 P.2d at 1205-06. Thus, despite the fact that Ms. Pierce was not before the court and had had no opportunity to be heard on the impact of the court's ruling in *Ortega* on her case, the New Mexico Supreme Court explained that the result of Ms. Pierce's direct appeal would remain intact for two reasons: first, because unlike the jury

verdict in *Ortega*, the jury verdict in Ms. Pierce's case involved an "undifferentiated verdict of first degree murder," 112 N.M. at 563, 817 P.2d at 1205, and second, because "no issue was raised in *Pierce* as to the constitutionality, under *Sandstrom v. Montana* or any other case, of the conclusive presumption entailed by the felony-murder rule." *Id.* at 564, 817 P.2d at 1206. Perhaps because Ms. Pierce had been given no opportunity to address these issues, the first basis of the New Mexico Supreme Court's analysis was premised on an erroneous view of the law as applied to the facts of Ms. Pierce's case, and the second was based on an erroneous reading of the record (a record which the Tenth Circuit concluded neither it nor the district court needed to review).

On the "undifferentiated verdict" point, the *Ortega* decision suggested that retrial was not required in Ms. Pierce's case because the jury *might have* convicted Ms. Pierce on the premeditated rather than felony murder theory. That finding flies directly in the face of decisions by this Court. Because it was not clear upon which first degree murder theory the jury relied, a reviewing court must assume that the jury based its verdict on the unconstitutional grounds. *See Sandstrom v. Montana*, 442 U.S. 510, 526 (1979) ("it has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside") (internal cites and brackets omitted); *Stromberg v. California*, 283 U.S. 359, 367-68 (1931) (reversing a general, undifferentiated verdict of conviction where the court gave the jury three alternative theories, one of which was unconstitutional; "if any of the [theories of conviction] in question is invalid under the Federal Constitution, the conviction cannot be upheld").

The second basis for the court's distinguishing of *Pierce* from *Ortega* was that "no issue was raised in *Pierce* as to the constitutionality, under *Sandstrom v. Montana*, or any other

case, of the conclusive presumption entailed by the felony-murder rule." 112 N.M. at 564, 817 P.2d at 1206. That statement is simply factually incorrect. The state district court in its order denying petitioner's state habeas petition noted that trial counsel had objected to this instruction at trial, and appellate counsel raised the *Sandstrom* issue as well. As a result, neither of these grounds was a valid basis for the New Mexico Supreme Court to distinguish its holding in *Ortega* from the appropriate decision in Ms. Pierce's case.

Relying in part upon these inaccurate statements of what had happened in Ms. Pierce's case, the Tenth Circuit here erroneously affirmed the application of a sufficiency of the evidence analysis. The federal district court reasoned that because the state court found "the record contained sufficient evidence to support Petitioner's conviction for either under the felony murder instruction given or the instruction given for deliberate murder so that any error committed was inconsequential to the outcome of the trial," the "New Mexico court's decision [was] not contrary to or an unreasonable application of clearly established federal law." (App. 25a). The inquiry under *Brecht*, however, is not whether the evidence would have been sufficient to support the verdict, but whether one can say, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error. . . ." *Kotteakos*, 328 U.S. at 765.

The Tenth Circuit sought to avoid that standard by arguing that

> it would be absolutely inconsistent to find beyond a reasonable doubt that Pierce was sane enough to purposefully kidnap the victim with the specific intent to take the victim's baby, but

> that she was not sane enough to know that strangling the victim and cutting her open to get the baby was likely to result in great bodily harm.

(App. 6a-7a).

That assumption reflects a lack of understanding of the evidence presented at Ms. Pierce's trial (which an independent review of the state court trial record might have corrected). Indeed, testimony from the expert witnesses at trial, including the testimony of one of the state's experts, supported the possibility that Ms. Pierce may have had the necessary intent to kidnap the victim but that her mental condition deteriorated during the encounter so that at the time of the killing Ms. Pierce did not possess the requisite *mens rea* for felony murder. As a result, the jury's verdict on the kidnaping count did not necessarily establish her intent for the felony murder charge.

Thus, the application of relevant decisions of this Court compels a finding that Ms. Pierce's petition seeking to set aside her conviction for first degree murder should be granted. A court cannot be satisfied on the record in this case, that "the judgment was not substantially swayed by the error. . . ." *Kotteakos*, 328 U.S. at 765. In addition, the state district court's adoption of the New Mexico Supreme Court's comment in *Ortega* that the record in Ms. Pierce's case clearly established that she had the requisite *mens rea*, was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

In this case, Ms. Pierce's state of mind was the linchpin of her defense. The jury's undifferentiated verdict of first degree murder, given all the conflicting evidence on her state of mind, did not necessarily establish that the jury found that Ms. Pierce intended to kill or that she was aware that her acts

created a strong possibility of great bodily harm when she took the baby. Rather the verdict may have merely reflected the jury's finding that she committed the felony of kidnaping and that Mrs. Ray died as a direct result of the commission of that felony.

Overall, the trial court's failure to instruct the jury on the essential element of *mens rea* for felony murder violated Ms. Pierce's constitutional rights and that error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. Therefore, the denial of Ms. Pierce's petition on this ground conflicts with relevant decisions of this Court and warrants the granting of certiorari.

CONCLUSION

For the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2000

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARCI KAYLEEN PIERCE, **Petitioner-Appellant,** **v.** **PENNY LUCERO, Warden and ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO,** **Respondents-Appellees.**	**No. 99-2219** **(D.C. No. CIV-98-799-JC)** **(D. N.M.)**

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

(Filed December 6, 1999)

Before **TACHA, McKAY,** and **MURPHY,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Darci Kayleen Pierce was found guilty but mentally ill of first-degree murder, kidnaping, and child abuse. She seeks a certificate of appealability (COA) to appeal from the district court's denial of her petition for relief under 28 U.S.C. § 2254. Under the Antiterrorism and Effective Death Penalty Act of 1996, codified in relevant part at 28 U.S.C. § 2254(d),

> a state prisoner will be entitled to federal habeas corpus relief only if he can establish that a claim adjudicated by the state courts "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court

> proceeding." Further, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(l). That presumption of correctness is rebuttable only "by clear and convincing evidence." *Id.*

Boyd v. Ward, 179 F.3d 904, 911-12 (10th Cir. 1999) (quoting § 2254(d)). The district court concluded that Pierce was not entitled to federal habeas relief because she had not satisfied this standard, and denied her request for a COA. In her application for a COA to this court, Pierce raises four issues she ascertains satisfy the requirement of a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). They include claims that: (1) her rights were violated when the state trial court failed to instruct the jury on a *mens rea* element for felony murder; (2) her Sixth Amendment right to a fair and impartial jury was violated when a juror intentionally failed to disclose material information that would have provided a valid basis for striking that juror for cause; and (3) her Sixth Amendment right to effective assistance of counsel was denied when her trial counsel failed to investigate the mental health history of her biological family. These three issues were presented to the state courts either on direct appeal or in state habeas proceedings. The state courts held evidentiary hearings on the second and third claims and discussed the resolution of all three issues in orders denying relief. The three issues also provided the basis

for Pierce's federal habeas petition. In her application to this court, she adds an additional claim that the federal district court violated her rights to due process by denying her federal habeas petition without reviewing the entire trial transcript of the state court proceedings.

1. Failure to review the entire state court record. A review of the entire trial transcript is at times necessary to resolve a habeas issue. *See Aycox v. Lytle*, No. 98-2298, 1999 WL 1037603, at *2 (10th Cir. Nov. 16, 1999) (noting that independent review of the record is necessary when a state court has not articulated its reasoning for denying postconviction relief on the merits). When the state court has articulated its reasoning and cited facts supporting its decision, however, and depending on the nature of the habeas claim, the district court may have enough facts before it to resolve an issue without reviewing the whole record. *See Guzman v. Williams*, No. 98-2172, 1999 WL 430059, at **4 (10th Cir. June 28, 1999) (holding that, in light of the record before it and the specific nature of the claim, the federal district court did not err in dismissing some habeas claims without reviewing the whole trial transcript) (unpublished). The state courts in this case fully articulated their reasoning in denying relief on each of the three issues for which Pierce alleged state-court error. The facts supporting their decisions are set forth in the opinions and orders. Because the federal district court could analyze Pierce's claims on the facts presented, it did not err in refusing to review

the whole trial transcript.

2. Failure to instruct on an essential element. The jury returned an undifferentiated first-degree murder verdict without specifying whether it relied on deliberate murder or felony murder as the basis for its verdict. The state habeas court carefully reviewed the whole record, conducted the harmless error analysis required by the admitted error of failing to instruct on a *mens rea* element for felony murder, and concluded that the record

> elaborates sufficient evidence of malice that the jury would have been justified convicting Ms. Pierce on either the deliberate murder or the felony murder instruction, especially considering the extensive testimony regarding Ms. Pierce's state of mind. As intent was adequately proven, whether error was committed was inconsequential to the outcome.

Appellant's Joint App., Vol. 1 at 389. The federal district court reexamined the analysis and found it to be sound. *See* Appellant's Br., Ex. C at 7-9. In her application for COA, Pierce alleges that the state habeas court failed to use the proper standard found in *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (stating that the habeas standard for harmless error is

whether the error had "substantial and injurious effect or influence in determining the jury's verdict"), and that the federal district court failed to recognize that the state court had used the wrong standard. *See* Appellant's Br. at 29. Contrary to this assertion, the federal district court specifically applied the *Brecht* standard, determined that the state court had, in fact, also applied the standard, and concluded that under the undisputed facts as established at trial, "there can be little question that Petitioner knew that her acts created a strong possibility of great bodily harm to the victim" so that the error was indeed harmless. *See id.*, Ex. C at 8-9.

Pierce argues that she presented enough evidence to support her insanity defense that intent was a crucial issue and substantial questions existed whether she in fact knew her acts caused a strong possibility of harm to the victim. She also argues that the nature of the guilty but mentally ill verdict demonstrates that the jury found the evidence of the mental illness persuasive. Pierce ignores the fact, however, that by rejecting her insanity defense and finding her guilty, the jury also found that she was not so mentally ill that she did not know what she was doing or was not unaware of the difference between right and wrong. Further, the jury found beyond a reasonable doubt when it convicted her of kidnaping that Pierce took her victim by force or deception with the intent to take the victim's baby from her. *See* Appellant's Joint App.. Vol. 1 at 384. It would be absolutely inconsistent to find beyond a

reasonable doubt that Pierce was sane enough to purposefully kidnap the victim with the specific intent to take the victim's baby, but that she was not sane enough to know that strangling the victim and cutting her open to get the baby was likely to result in great bodily harm. Having failed to show that the state court's harmless error analysis was unreasonable or contrary to federal law, Pierce was not entitled to federal habeas relief on this issue and has also failed to make a substantial showing of the denial of a constitutional right.

3. Failure to grant new trial due to alleged juror bias. Pierce did not raise her juror bias claim in her state habeas petition, *see* Appellant's Joint App., Vol. I at 388, 395, but she did directly appeal on that ground, *see State v. Pierce*, 788 P.2d 352, 354-56 (N.M. 1990). In response to the trial court's voir dire question, "have you ever had to be treated by a psychiatrist or psychologist for any reason?", the juror answered, "Not that I remember, your Honor. . . . [A]t one time, I had...kind of a dizzy spell, and they thought that I needed a psychiatrist, and finally a doctor got ahold of me and took care of me. So I didn't have to have a psychiatrist." *Id.* at 354. Pierce requested a new trial after discovering that the juror had apparently told a reporter contradictory information after the trial. The trial court held an evidentiary hearing, and the juror admitted that he had experienced a traumatic event as a child that resulted in his hospitalization for depression. He maintained, however, that he had never been treated by a psychiatrist at the hospital, and that

his doctors were dealing with his loss of speech and not with his mind during treatment. *See id.* The trial court concluded that Pierce had failed to establish either an intentional material misrepresentation or actual prejudice and denied the motion for new trial. *See id.* On appeal, the New Mexico Supreme Court held that, assuming the jurors's voir dire statements that he had not personally received psychological counseling were intentional misrepresentations,

> his statements were not germane to his capacity to sit as an impartial juror; . . . [that Pierce] has not shown how she was actually prejudiced by the juror's sitting on the jury; . . . [that Pierce] was not entitled as a matter of law to have exercised a peremptory challenge to strike the juror from sitting on the jury; and [that] the trial court soundly exercised its discretion in denying the motion for new trial

based on the juror's failure to disclose. *Id.* at 356. The court also noted that it was not clear whether, had Pierce known the juror had been treated for depression in a mental hospital, she would have regarded him as an unfavorable juror at the time. *See id.*

In her federal habeas petition, Pierce alleged that the

trial court's factual finding that she had not shown that the juror intentionally and dishonestly concealed a material fact was not fairly supported by the record. *See* Appellant's Br., Ex. C at 11-12. Contrary to Pierce's allegations, the federal district court did not analyze only a single response by the juror in determining that the trial court's finding was supported in the record. Referring to parts of the record that quoted the juror's testimony and to the Supreme Court opinion that also quoted testimony, the federal district court found that "[p]etitioner's contention that the trial court's findings are unsupported by the record is itself unsupported," and concluded that Pierce had failed to show that the "trial court's findings are based on an unreasonable determination of the facts in light of the evidence presented to it." *Id.* at 12.

In her application for COA, Pierce further argues that the juror's post-trial statements at the evidentiary hearing that he could "see the devil" in her called into question his ability to be an impartial juror, and both the state and federal courts erred in not recognizing the implications of this testimony. Appellant's Br. at 43. Pierce fails to connect the juror's alleged dishonesty in answering voir dire questions with this post-trial statement. The New Mexico Supreme Court noted that at the hearing on her motion for new trial, Pierce did not raise this post-trial remark as an issue warranting new trial. *See Pierce*, 788 P.2d at 356. The court also noted that

> the juror testified that he arrived at his verdict on the basis of the evidence presented at trial, and not on the basis of . . . his ability to "see the devil in the Appellant." When asked by defense counsel if his experience with former mental patients had given him "special insights as to whether [Appellant] was insane," the juror answered, "No, no. Like I said, at that time when I was sitting as a juror, it did not even enter -- it didn't enter my mind at all."

Id. Pierce does not explain why, in light of this undisputed testimony and the accompanying analysis, the state court's conclusions were contrary to or involved an unreasonable application of clearly established federal law, or that there was an unreasonable determination of the facts in light of the evidence. Thus, the federal district court properly held that federal habeas relief should not be granted and a COA also should not issue on this ground.

4. Ineffective assistance of counsel. The district court's denial of relief based on Pierce's ineffective assistance of counsel claim rested on an undisputed fact set forth in the state court habeas decision after that court held an evidentiary hearing on the issue. The state court ruled that because none of the six mental health experts employed by the state or the defense demanded or requested biological background

information, counsel was not deficient in failing to attempt to locate Pierce's biological mother to inquire whether there was any family history of mental illness. *See* Appellant's Joint App., Vol. I at 392. The court alternately concluded that, even if counsel was deficient in not conducting such an investigation, the testimony regarding Pierce's mental state was so extensive "there is little probability that had the biological mother been located the outcome of the trial would have been different." *Id.* Although Pierce now alleges that the mental health experts could have diagnosed a specific disorder more readily and that at least one of her experts would have changed her testimony to include an opinion that Pierce was insane at the time of the murder, the record reflects that at least one of her four mental experts *did* testify at trial that she met the New Mexico standard for a finding of not guilty by reason of insanity. *See id.* at 380. Both state experts apparently testified at the evidentiary hearing that Pierce's genetic history discovered after the trial would not be regarded as of any great importance and that it did not change their opinion regarding Pierce's mental evaluation--that she suffered from certain mental ailments, but was not insane at the time she committed the homicide. *See id.*

As the federal district court pointed out, Pierce has not shown in her federal habeas petition that the state court's adjudication of this issue is unreasonable or contrary to clearly established law or is based on an unreasonable determination of facts. She simply asks this court to reanalyze the facts and law

and come up with a different result. She has failed to establish the right to a writ under 28 U.S.C. § 2254(d). See Appellant's Br., Ex. C at 7, 15. Consequently, she also has failed to make a substantial showing of the denial of a constitutional right on this issue.

Pierce's application for a COA is DENIED and the appeal is DISMISSED. The mandate shall issue forthwith.

Entered for the Court

Michael R. Murphy
Circuit Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DARCI KAYLEEN PIERCE,

Petitioner,

vs. Civ. No. 98-799 JC/DJS

PENNY LUCERO, Warden,

Respondent.

ORDER AND JUDGMENT

(Filed June 10, 1999)

This matter having come before the Court on the proposed findings and recommended disposition of the United States Magistrate Judge, objections to the proposed findings and recommended disposition having been filed, and the Court having made a de novo determination of the Magistrate Judge's proposed findings and recommended disposition;

IT IS HEREBY ORDERED that the proposed findings and recommended disposition of the United States Magistrate

Judge are adopted by the Court;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this action be, and hereby is, dismissed with prejudice.

/s/ John Edwards Conway

HON. JOHN EDWARDS CONWAY
CHIEF UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DARCI KAYLEEN PIERCE,

Petitioner,

v. **CIVIL NO. 98-799 JC/DJS**

PENNY LUCERO, Warden,

Respondent.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION[1]

(Filed May 17, 1999)

1. THIS MATTER is a proceeding on a petition for a

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[1] Within ten (10) days after a party is served with a copy of these proposed findings and recommendations, that party may, pursuant to 28 U.S.C. § 636(b)(l), file written objections to such proposed findings and recommendations. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. Petitioner is represented by counsel and seeks to vacate the judgment and sentence entered in CR 43635 in the Second Judicial District, Bernalillo County, of New Mexico. In that proceeding, Petitioner was convicted upon a jury verdict of First Degree Murder, Kidnaping, and Child Abuse (no death or great bodily harm). The jury found Petitioner guilty but mentally ill on each of the above charges. Petitioner was sentenced to a term of imprisonment of life plus nineteen and one-half years.

2. As the Court construes the petition, Petitioner challenges her conviction and sentence on seven grounds. First, she asserts that she was deprived due process because the trial court did not instruct the jury that it must find the element of "intent to kill" in order to convict Petitioner of felony murder. Second, Petitioner asserts that she was denied her right to an impartial jury because a juror claimed that he had never had any kind of psychiatric or psychological counseling when he had actually been hospitalized for depression. Third, Petitioner claims that her trial counsel were ineffective because they failed to contact her biological family and discover a history of mental illness among them. Petitioner's fourth claim for relief is that she was denied due process by the trial court's use of a "guilty but mentally ill" instruction and by the trial court's failure to inform the jury of the consequences of a guilty but mentally ill verdict. Fifth, Petitioner asserts that the guilty but mentally ill verdict subjected her to cruel and unusual punishment. Sixth,

Petitioner asserts that she was denied due process by the jury instruction which stated that the jury need only decide that she committed the acts charged before deciding whether she was insane at the time she committed the acts. Petitioner argues that the instruction left out the necessary element of *mens rea* and contradicted other instructions, Petitioner's seventh and final claim for relief is that her right to be free from double jeopardy was violated by the imposition of separate sentences for kidnaping and for felony murder.

3. 28 U.S.C. §2254(b)(1) and (c) require that a state prisoner seeking relief must exhaust state remedies before seeking to obtain relief in a federal *habeas* proceeding. See generally, Rose v. Lundy, 455 U.S. 509 (1982). Respondent concedes that Petitioner has exhausted her state court remedies as to the claims brought in the instant petition.

4. On October 14, 1998, Respondent filed a motion to dismiss the petition, arguing that Petitioner had received a full and fair hearing of all of her claims in state court and that relief on those claims was denied by decisions which constitute neither an unreasonable determination of the facts nor results contrary to clearly established federal law. Petitioner responded to the motion on November 18,1998. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified in part as 28 U.S.C. §2254(d), established a new standard of review for *habeas* petitions in federal court which bring claims which were

adjudicated on the merits in state court. The statute provides that no application for a writ of *habeas corpus* resting on such grounds shall be granted unless the state adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or the state adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court. Respondent asserts that Petitioner is not entitled to relief under the standard of review mandated by AEDPA. Petitioner contends that the AEDPA standard should not be applied to her petition.

5. In order to address the applicability of AEDPA to the instant petition, this Court must review the procedural history of Petitioner's conviction and efforts to obtain post-trial relief. Petitioner's judgment and sentence was entered on May 9, 1988. Answer, Ex. A. Petitioner filed a direct appeal in which she asserted that she was denied her right to an impartial jury and due process, that the felony murder instruction given deprived her of due process and a fair trial, that one of the instructions given violated due process by shifting the burden of proof, that another instruction failed to appropriately track New Mexico's guilty but mentally ill statute and deprived her of due process and a fair trial, and that the prosecutor's questioning of a defense expert witness deprived her of due process and a fair trial. Answer, Ex. B. The New Mexico Supreme Court denied the direct appeal on February 27, 1990. Answer, Ex. C; State v.

Pierce, 788 P.2d 352 (1990). On April 6, 1988, Petitioner flied a motion for a new trial in state court, alleging that a juror provided misleading answers during *voir dire* and was biased against her. Answer, Ex. H. Following an evidentiarv hearing, the state court denied the motion. Answer, Ex. J. Petitioner filed a federal *habeas* petition pursuant to 28 U.S.C. §2254 on February 28,1994. Answer, Ex. K. In that petition, she asserted that she was denied a fair and impartial jury because a juror concealed a material fact and because the trial court denied her a new trial; that the jury instruction given concerning "not guilty by reason of insanity" denied her of due process and equal protection; that she was deprived of due process and a fair trial because the trial court refused to give an instruction tracking the New Mexico guilty but mentally ill statute; and that the prosecutor's questioning of a defense expert witness deprived her of due process and a fair trial. Petitioner moved the Court to dismiss the action without prejudice to allow her to exhaust additional claims in state court. Answer, Ex. P. That motion was granted on October 23, 1995. On April 10, 1997, Petitioner filed a petition for writ of *habeas corpus* in state court. Answer, Ex. R. In that petition, Petitioner claimed that she was denied effective assistance of counsel; that she was denied due process and a fair trial by the state's felony murder instruction because that instruction did not require the jury to find the essential element of intent to kill; that she was subjected to double jeopardy because she was sentenced for both felony murder and the predicate crime of kidnaping; that she was denied due

process and a fair trial by the trial court's failure to instruct the jury on the consequences of a verdict of "not guilty by reason of insanity" or "guilty but mentally ill"; that the New Mexico guilty but mentally ill statute deprived her of due process and a fair trial; and that she was subjected to cruel and unusual punishment. The state court held an evidentiary hearing and denied the petition on May 4, 1998. Answer, Ex. X. Petitioner sought *certiorari* review of that denial from the New Mexico Supreme Court, which review was denied on June 24, 1998. Answer, Ex. Z. She then filed the instant petition on July 2, 1998.

APPLICABILITY OF AEDPA

6. Petitioner argues that AEDPA does not apply to the three claims in the instant petition which she raised in her initial federal *habeas* action. Petitioner reasons that because she brought her first *habeas* petition prior to the passage of AEDPA, the terms of the act do not apply to the claims asserted in that petition because it was dismissed without prejudice and this petition is merely a continuation of the earlier petition. Petitioner also argues that AEDPA does not apply because it is impermissibly retroactive if it requires a different outcome for her petition from the outcome which might be obtained under pre-AEDPA law. Both of these arguments were recently subjected to extensive analysis by the Fifth Circuit Court of Appeals in Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999).

7. Petitioner's earlier filing of a federal §2254 action does not impact the applicability of AEDPA to the instant petition. AEDPA applies to §2254 actions filed after the effective date of the statute, which was April 24,1996. See Felker v. Turpen, 518 U.S. 651 (1996) (Applying AEDPA standard regarding second or successive petitions to §2254 action filed after April 24,1996); Pease v. Kilinger; 115 F.3d 763 (10th Cir. 1997)(same). Petitioner's previous federal *habeas* petition containing unexhausted claims cannot serve to grandfather those claims to a standard of review limited to pre-AEDPA law. Graham, 168 F.3d at 774 (Applying AEDPA standards to petition filed November 18, 1998 where the petitioner had a §2254 action pending at the time AEDPA became effective, which action was dismissed for failure to exhaust state remedies); Mancuso v. Herbert, 166 F.3d 97, 101 (2d Cir. 1999)("...AEDPA applies to a *habeas* petition filed after the AEDPA's effective date, regardless of when the petitioner filed his or her initial *habeas* petition and regardless of the grounds for dismissal of such earlier petition....").

8. Petitioner's argument that AEDPA is impermissibly retroactive also fails. Petitioner asserts that she had a choice when she moved to dismiss her first federal *habeas* petition: she could seek dismissal of that petition without prejudice and present her unexhausted claims to the state courts or she could continue with the claims she had already raised in federal court and exhausted. Petitioner argues that because she

had no way of knowing that AEDPA would be passed and relied upon the availability of the pre-AEDPA standard of review when she chose to exhaust her additional claims in state court. However, Petitioner was not entitled to rely upon the availability of the pre-AEDPA standard of review while she exhausted her state remedies. Graham, 168 F.3d at 786 (Petitioner not entitled to place any reliance on the filing of an unexhausted petition); Greenawalt v. Stewart; 105 F.3d 1268, 1275 (9th Cir. 1997). (Refusing to require district court hold an unexhausted §2254 petition filed before the effective date of AEDPA in abeyance while the petitioner exhausted his state court remedies despite the fact that a subsequent petition would face more stringent review under the act). Consequently, AEDPA applies to all claims in the instant petition.

STANDARD OF REVIEW

9. As noted, 28 U.S.C. §2254(d) provides that:

> An application for writ of *habeas corpus*... shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,

> as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The second subsection specifies the standard of review governing questions of fact, the first specifies distinct standards of review governing questions of law and mixed questions of law and fact. Carter v. Johnson, 110 F.3d 1098,1103 (5th Cir. 1997)(citations omitted). Petitioner argues that this Court cannot grant Defendant's motion to dismiss without reviewing the record proper of all the state court proceedings. In her response to the motion to dismiss, she cites extensively to that record, which has not been ordered by this Court. Petitioner does not include the portions of the state court record to which she refers as exhibits to her response to the motion to dismiss. However, review of the record proper is not necessary because Petitioner has not shown that the state courts' adjudications of her claims were inappropriate or incorrect under 28 U.S.C. §2254(d).

JURY INSTRUCTION CLAIMS

10. As her first claim for relief, Plaintiff asserts that she was denied due process because the felony murder instruction

given to the jury did not instruct it that it must find that she possessed an intent to kill. At the time of Plaintiff's conviction, "intent to kill" was not a required element of felony murder in New Mexico. State v. Pierce, 788 P.2d 352, 357 (NM 1990). The New Mexico Supreme Court later construed the New Mexico statute regarding felony murder as requiring proof of an intent to kill. State v. Ortega, 817 P.2d 1196,1204 (NM 1991). Specifically, New Mexico now requires that, to be convicted of felony murder, that state must prove that the defendant had the knowledge that his or her acts created a strong probability of death or great bodily harm to the victim or another. Id. at 1205. Petitioner argues that the state court entered a ruling which is contrary to clearly established federal law when it denied her *habeas* petition seeking to vacate her felony murder conviction in light of the Ortega ruling. Petitioner contends that, in light of Ortega, the jury in her case was not instructed to find an essential element of the crime of felony murder and that she was thereby deprived of due process.

11. In California v. Roy, 519 U.S. 2 (1996) (*per curiam*), the Supreme Court examined the question of whether an instruction which, contrary to a later state decision, did not inform the jury that it must find that the petitioner intended to aid in an accomplice's commission of the crime mandated *habeas* relief for a petitioner convicted of accomplice felony murder. The Supreme Court stated that the error in the instruction defining the crime was a trial error subject to

harmless error analysis pursuant to Brecht v. Abrahamson 507 U.S. 619, 629 (1993). Roy, 519 U.S. at 5. The Tenth Circuit Court of Appeals has applied the Roy analysis to the question of whether failure to instruct a jury that it must find that the petitioner had the requisite intent to commit felony murder under New Mexico's Ortega decision required *habeas* relief where the petitioner's conviction predated Ortega. Espinosa v. Williams, 132 F.3d 42, 1997 WL 767766 (10th Cir. Dec. 11, 1997) (Unpublished Disposition). Consequently, the appropriate standard of review for the error in the jury instruction in Petitioner's case is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict. Roy, 519 U.S. at 5 (citations omitted). The New Mexico District Court applied that standard when reviewing Petitioner's state *habeas* petition. Answer, Ex. X, p. 2. That court also concluded that the record contained sufficient evidence to support Petitioner's conviction for either under the felony murder instruction given or the instruction given for deliberate murder so that any error committed was inconsequential to the outcome of the trial. Id. at 3. The New Mexico court's decision is not contrary to or an unreasonable application of clearly established federal law.

12. Regardless of the New Mexico court's decision on this claim, it is insufficient to provide Petitioner with relief. In this case, Petitioner kidnaped the victim, took her to a remote location, strangled her to unconsciousness, then performed a

crude cesarean section delivery of the woman's baby and left the victim to bleed to death. Pierce, 788 P.2d at 353. Given those facts as found by the state supreme court from the evidence at trial, there can be little question that Petitioner knew that her acts caused a strong possibility of great bodily harm to the victim. Consequently, the failure to instruct the jury that it must have found an intent element to the crime was a harmless error.

13. Petitioner's fourth claim for relief is that her due process rights were violated by the trial court's use of a guilty but mentally ill jury instruction or by the trial court's failure to inform the jury of the consequences of a guilty but mentally ill verdict once the instruction was given. The New Mexico state court rejected this claim when presented as part of Petitioner's state *habeas* petition, relying in part upon State v. Neely, 819 P.2d 249 (NM. 1991). The Tenth Circuit Court of Appeals recently denied the appeal of the denial of a §2254 petition brought by Judith Ann Neely based, in part, upon the same theory which Plaintiff relies upon in this ground. Neely v. Newton, 149 F.3d 1074 (10th Cir. 1998) cert. denied, 119 S.Ct. 877 (1999). Neely holds that the New Mexico's guilty but mentally ill statute does not violate a mentally ill defendant's right-to-due process and a fair trial. Neely 149 F.3d at 1082. Further, a trial court is not required to instruct a jury on the consequences of a verdict of guilty but mentally ill. Id. at 1085 (citing Shannon v. United States, 512 U.S. 573 (1994)). The New Mexico court's opinion is not contrary to clearly

established federal law and Petitioner has not shown that it is based upon an unreasonable determination of the facts. Consequently, Petitioner is not entitled to relief on this ground.

14. Petitioner's sixth ground for relief is that she was denied due process by a jury instruction which told the jury that it needed to decide if she committed the "acts" charged before deciding whether she was insane at the time. In the petition. Petitioner states that the trial court told the jury that it should first consider whether she committed the crime and if it determined that she committed the acts charged but was not convinced beyond a reasonable doubt that she was sane at the time, it must find her not guilty by reason of insanity. Petitioner claims that the instruction left out the *mens rea* element of the crimes charged and contradicted other instructions given to the jury. The New Mexico Supreme Court rejected this claim on direct appeal. Pierce, 788 P. 2d at 358-59.

15. It is settled law that "[i]n a habeas proceeding attacking a state court judgment based on an erroneous jury instruction, a petitioner has a great burden." Maes v. Thomas, 46 F.3d 979, 984 (10th Cir.) cert. denied, ___U.S.___, 115 S.Ct. 1972 (1995) (citing Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) cert. denied, 510 U.S. 1120 (1994)). A federal habeas court may only set aside a state conviction on the ground of an erroneous jury instruction "when the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial

of a fair trial." Maes, 46 F.3d at 984; see also Cupp v. Naughten, 414 U.S. 141,146 (1973). The Supreme Court has explained that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, 431 U.S. 145,154 (1977). Plaintiff cannot show that the jury instruction directing the jury to decide if she committed the "acts" charged before deciding whether she was insane at the time resulted in a trial which was fundamentally unfair where the jury was also instructed that it must first consider whether she committed the crime. The definitions of the charged crimes given the jury doubtless incorporated the necessary intent elements of the offenses. Consequently, Petitioner is not entitled to relief on this ground.

RIGHT TO AN IMPARTIAL JURY

16. As her second claim for relief, Petitioner asserts that she was denied her right to a fair and impartial jury because one of the jurors who sat on her trial failed to disclose that he had been hospitalized for a year for depression and stated during *voir dire* that he had never received counseling of any kind. This claim was first raised by Petitioner as a motion for a new trial. Answer, Ex. H. After an evidentiary hearing, the trial court denied that motion. Answer, Ex. J. The trial court held

that Petitioner had not demonstrated actual bias or prejudice on the part of the juror. Id. Petitioner raised the claim again in her direct appeal. Answer, Ex. C. The New Mexico Supreme Court also held that Petitioner was not denied her right to a fair trial and that she had not shown actual prejudice from the juror's seating. Pierce, 788 P.2d at 256.

17. When a party challenges the result of a trial on the basis of a juror's alleged untruthfulness in *voir dire*, the two-part test articulated by the Supreme Court in McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984), applies. Gonzales v. Thomas, 99 F.3d 978, 984 (10th Cir. 1996), cert. denied, 520 U.S. 1159 (1997). Per that test, the challenging party must first demonstrate that a juror failed to honestly answer a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. McDonough, 464 U.S. at 556. In order to meet the first part of the test, Petitioner must show that the juror in her case failed to answer honestly, rather than giving a mistaken, though honest, response to a question. Gonzales, 99 F.3d. at 984 (citations omitted). The question of a juror's honesty in *voir dire* is a factual question, Id. at 985 (citing Patton v. Yount, 467 U.S. 1025, 1036-38 & 1037 n. 12 (1984)). In this case, the trial court held after an evidentiary hearing that Petitioner had not shown that the juror concealed a material fact. Answer, Ex. J.

18. Petitioner argues that the trial court's factual finding is not fairly supported by the record. During *voir dire*, the trial court asked potential jurors whether they had been treated by a psychiatrist or a psychologist for any reason. Petition, p.7. Juror Tom Griego responded that he had once had a dizzy spell, for which he was treated. Id. at 8. The trial judge then asked Griego whether he had ever been treated by a psychiatrist or a psychologist or had any kind of counseling. Griego responded that he had not. Id. At the evidentiary hearing held upon Petitioner's motion for a new trial, a newspaper reporter testified that he had interviewed Griego after the trial and Griego had told him that he had been mentally ill when he was in his early teens and had to be hospitalized, where he received shock treatments. Id. At that hearing, Griego testified that he had a speech problem at age thirteen, for which he was beaten by his father, resulting in his intermittent hospitalization for about a year for depression. Id. When asked the compound question "So the sessions at the hospital that you received, they were kind of like counseling sessions? People would talk to you, trying to get you to talk?" Greigo responded "Yes, correct." Petitioner's Response to Motion to Dismiss, p. 16. However, Griego maintained in his testimony at the evidentiary hearing that he was not treated by a psychiatrist or a psychologist. Pierce, 788 P.2d at 355. Griego denied telling the reporter that he had been mentally ill. Id. Petitioner's contention that the trial court's findings are unsupported by the record is itself unsupported. Petitioner relies upon Griego's response to a

compound question for the proposition that he contradicted his *voir dire* testimony in his testimony at the evidentiary hearing. Petitioner's unsupported argument that the trial court's findings are contradicted by the record is insufficient to require the federal court to winnow through the record proper in the wake of two state courts. Petitioner has not shown that the trial court's findings are based on an unreasonable determination of the facts in light of the evidence presented to it. Because Petitioner did not demonstrate for the trial court that Griego failed to honestly answer a material question in *voir dire*, she cannot satisfy the McDonough test. Gonzales, 99 F.3d at 985.

19. The petition does not explicitly raise actual or implied bias on the part of juror Griego, although she does discuss implied bias in her response to the motion to dismiss. This Court will briefly address that issue. See Gonzales, 99 F.3d at 985 (McDonough does not provide exclusive analysis for juror-bias cases). Actual bias is a factual question which is reviewed only for clear error. Id. at 986 (citing Patton, 467 U.S. at 1036). The trial court held that Petitioner had not demonstrated actual bias in denying her motion for new trial. Answer, Ex. J. Petitioner has raised no argument nor cited to any portion of the state court record which calls into question that finding under the standard articulated in 28 U.S.C. §2254(d). Implied bias is a legal detemination which turns on an objective evaluation of the challenged juror's experiences and their relation to the case being tried. Id. at 987. Implied bias

may be found even though a juror denies any partiality. Id. However, relief under the doctrine is reserved for extreme and exceptional circumstances that leave a serious question whether the petitioner was subjected to manifestly unjust procedures resulting in a miscarriage of justice. Id. (citations omitted).

20. In Petitioner's case, any implied bias arises from similarities between the juror's experiences and the facts which gave rise to the case, rather than from any personal connection between the juror and the parties or the circumstances of the trial. As noted previously, Juror Tom Griego had been treated for depression related to a speech problem. Griego testified at the state court evidentiary hearing that he had told a reporter that he had seen persons whose condition was ten times worse than Petitioner's cured in a mental hospital. Petition, p.8. Griego said that he did not consider his hospitalization to have healed him, but rather a religious experience. Pierce, 788 P.2d at 354. Griego testified that he saw the devil in Petitioner right away, because he is a spiritual man. Id. However, Griego maintained that he made his decision on the verdict based upon the evidence presented at trial. Griego also stated that his experience with former mental patients had not given him any special insights into whether Petitioner was insane. Id. at 356. Both the New Mexico Supreme Court and the trial court concluded that Petitioner had not shown that she was entitled to relief on the basis of implied juror bias. Given the testimony

before those courts and the high standard required for relief on that ground, that holding is not contrary to or an unreasonable application of clearly established federal law.

INEFFECTIVE ASSISTANCE OF COUNSEL

21. Petitioner's third claim for relief is that her trial counsel were ineffective because they failed to find and contact her biological family. Petitioner contends that, had counsel done so, her biological mother would have revealed a history of mental illness in her family which would have proven critical to her insanity defense. To succeed in this claim, Petitioner must show that her attorneys' performance fell below an objective standard of reasonableness and that the deficient performance prejudiced her defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential and indulges a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Rogers v. United States, 91 F.3d 1388, 1392 (10th Cir. 1996); Miles v. Dorsey, 61 F.3d 1459, 1478 (10th Cir. 1995) (citations omitted). Under the prejudice aspect of Strickland, a federal court inquires whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Rogers, 91 F.3d at 1392. Petitioner must establish that counsels' deficient performance rendered her trial fundamentally unfair or unreliable. Id.

22. Plaintiff raised her ineffective assistance of counsel claim in her state *habeas* petition. Answer, Exhibit R. After an evidentiary hearing, the New Mexico District Court denied relief on that ground, noting that six experts employed by both the state and by the defense had examined Petitioner without demanding her biological background. Answer, Exhibit, p. 6. The state court held that because of the extensive testimony on Petitioner's mental state, discovery of her biological mother would not have changed the outcome of the trial. Id. Respondent argues that due to the deference accorded state court findings pursuant to 28 U.S.C. §2254(d), Petitioner's ineffective assistance of counsel claim before this Court should be dismissed. Petitioner asserts that this Court cannot determine whether the state court's decision constitutes a reasonable determination of the facts in light of the evidence presented in the state court proceedings or an unreasonable application of federal constitutional law. Petitioner takes the position that Respondent must show beyond a doubt that she can prove no facts in support of her ineffective assistance of counsel claim which would entitle her to relief.

23. A federal *habeas* proceeding pursuant to 28 U.S.C. §2254 is a civil proceeding in which the burden is on the petitioner to prove by a preponderance of evidence that she is entitled to relief. Miles v. Dorsey, 61 F.3d 1459, 1472 (10th Cir. 1995) cert. denied, 116 S.Ct. 743 (1996); Godbold v. Wilson, 518 F.Supp. 1265, 1269 (D.Co. 1981) (citations omitted).

Because Petitioner's claims were adjudicated on the merits in the New Mexico courts, in order to succeed on her petition she must show that the decisions of those courts involved an unreasonable application of clearly established federal law or were based upon an unreasonable determination of the facts in light of the evidence she presented to the state courts. 28 U.S.C. §2254(d). By her motion to dismiss, Respondent asserts that Plaintiff cannot meet that burden. Further, Petitioner bears the burden of rebutting determinations of factual issues by the New Mexico Courts by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

24. Petitioner asserts that Respondent bears a heavy burden to prove that she is entitled to relief. However, she ignores her own burden. Petitioner must rebut the state courts' findings of fact by clear and convincing evidence. She must also show that those courts' decisions were based upon an unreasonable determination of the facts in light of the evidence presented. Rather than meeting her own burden, Petitioner requests that this Court review the record proper from the state court, without showing how review of that record will demonstrate that she is entitled to relief. Petitioner cannot escape her burden merely by the fact that Defendant chose to file a motion to dismiss. She has not shown that she is entitled to an evidentiary hearing and she did not attach as exhibits any portions of the state court record to demonstrate by clear and convincing evidence that she is entitled to relief. All that

Petitioner has provided the Court is her assertions that her case should not be dismissed.

25. Petitioner is not entitled to relief on her claim that she was not afforded effective assistance of counsel. An attorney has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary. Strickland, 466 U.S. at 691. The state court made the factual finding that six expert witnesses had examined Petitioner without demanding her missing biological family background. Answer, Ex. X, p.6. Given the deference due to that finding, Petitioner's counsel made a reasonable decision not to seek that information.

CRUEL AND UNUSUAL PUNISHMENT

26. Petitioner's fifth claim for relief is that she has been subjected to cruel and unusual punishment. This claim was incorporated in the fourth claim in the Petition, which asserted that she was denied due process by the state court's use of a guilty but mentally ill jury instruction and that court's failure to instruct the jury on the consequences of a guilty but mentally ill verdict. Plaintiff did not provide any argument in support of her contention that she has been subjected to cruel and unusual punishment in her response to Respondent's motion to dismiss. Further, the Tenth Circuit Court of Appeals has reviewed and rejected such a claim. Neely, 149 F.3d. at 1082. Consequently,

Petitioner is not entitled to relief on this ground.

DOUBLE JEOPARDY

27. Plaintiff's final claim for relief is that she has been subjected to double jeopardy by the imposition of separate sentences for kidnaping and felony murder. Petitioner argues that the felony underlying the felony murder was kidnaping and that the murder was the culmination of a continuous course of conduct flowing from the kidnaping. Petitioner asserts that the events constitute a "unitary" crime, relying upon State v. Contreras, 903 P.3d 228 (NM, 1995). The New Mexico Supreme Court has held that Contreras, which was decided after Petitioner's conviction became final, should be given prospective application only. Jackson v.State, 925 P.2d 1195, 1197 (NM, 1996) (cited in Jackson v. Shanks, 143 F.3d 1313, 1324 (10th Cir.) cert. denied, 119 S.Ct. 378 (1998). The Constitution does not require that state judicial decisions be applied retroactively and the issue of whether such decisions are to be applied retroactively is one of state law and cannot support federal *habeas* relief. Jackson, 143 F.3d at 1324 (citations omitted).

RECOMMENDED DISPOSITION

That Respondent's Motion to Dismiss be granted and this petition be dismissed with prejudice.

/s/ Don J. Svet

Don J. Svet

United States Magistrate Judge

Appendix D

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Wednesday, June 24, 1998

NO. 25.152

DARCI KAYLEEN PIERCE, **BERNALILLO**
(CR 87 - 43645)

Petitioner,

vs.

PENNY LUCERO,
Warden of the New Mexico
Women's Correctional Facility,

Respondent.

ORDER

This matter coming on for consideration by the court upon Petition for Writ of Certiorari filed pursuant to Rule 12-501 of the Rules of Appellate Procedure, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Petition for Writ of Certiorari is denied.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulé
Chief Deputy

Appendix E

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

DARCI KAYLEEN PIERCE,

Petitioner,

vs. **No. CR 87-43645**

PENNY LUCERO, Warden, NMWCF

Respondent.

ORDER ON APPLICATION OF WRIT OF HABEAS CORPUS

(Filed May 4, 1998)

I

Petitioner Darci Kayleen Pierce, was found guilty but mentally ill of first degree murder, kidnaping and child abuse by jury trial on March 29, 1988. The crimes were committed on July 23,1987. Ms. Pierce was sentenced to life imprisonment for first degree murder, eighteen years for kidnaping, and eighteen months for child abuse. The sentences were to run concurrently. Ms. Pierce directly appealed the decision to The Supreme Court of New Mexico who denied relief in their opinion dated

February 27, 1990. See Pierce v. State, 109 N.M. 596, 788 P.2d 352 (1990).

On April 10,1997 Petitioner filed a petition for writ of habeas corpus to the Second Judicial District, Bernalillo County, New Mexico pursuant to NMRA, 5-802. The petition was originally assigned to the Honorable James Blackmer. Judge Blackmer was excused by voluntary election on April 17, 1997 and the writ was reassigned to the Honorable W.C. Woody Smith. Judge Smith filed a recusal on April 18, 1997 and the writ was then reassigned to the Honorable Ross C. Sanchez. Judge Sanchez filed a recusal on April 22, 1997. The writ was reassigned and is considered here by the Honorable Albert S. Pat Murdoch.

Petitioner makes six claims for consideration in her petition for writ of habeas corpus: (1) whether failure to include an intent element in the felony murder instruction denied Ms. Pierce a fair trial or was fundamental error; (2) whether imposition of separate sentences for kidnaping and first degree murder violated Ms. Pierce's right against double jeopardy; (3) whether the guilty but mentally ill statute violates the defendant's right to due process and a fair trial; (4) whether the guilty but mentally ill statute subjects the defendant to cruel and unusual punishment; (5) whether the trial court's failure to instruct the jury on the consequences of the not guilty by reason of insanity and the guilty but mentally ill verdicts deprived Ms.

Pierce of due process and a fair trial; (6) whether defense counsel was ineffective for failing to contact Ms. Pierce's biological mother or for failing to raise on direct appeal or properly articulating objections to the lack of an intent element in the felony murder instruction, the claim of double jeopardy, the constitutionality of the guilty but mentally ill statute, and the consequences of the guilty but mentally ill instruction.

II

Petitioner argues that Ms. Pierce's conviction must be automatically reversed because the trial court offered alternative instructions for deliberate murder and felony murder, omitting an intent element in the felony murder instruction. Petitioner first claims that the omission represented a structural error which denied Ms. Pierce a constitutionally protected fair trial. Structural errors are those that affect "the framework within which the trial proceeds, rather than simply an error in the trial itself." Arizona v. Fulminate, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1990). However, the failure to provide an intent element in a felony murder instruction is not a structural error, but is a trial error subject to the harmless error rule. Carella v. California, 491 U.S. 263, 266, 109 S.Ct. 2419, 2421 (1989); Rose v. Clark, 478 U.S. 570, 580-82, 106 S.Ct. 3101, 3107-08 (1986).

Relying on State v. Osborne, 111 N.M. 654, 662, 808

P.2d 624, 632 (1991), Petitioner further claims that the failure to include an intent element in the felony murder instruction represented fundamental error under state law standards. The Supreme Court recently considered, with Osborne in mind, whether the same standard of fundamental error is committed once procedures are finalized, specifically holding that

"the same considerations of fundamental error do not apply once proceedings are finalized by direct appeal . . . we do not reexamine essential instructions in proceedings after finality. Only in this sense is the clarification of existing law not retroactive."

State v. Kirby, 122 N.M. 609, --, 930 P.2d. 144, 146 (1996). This Court also finds it significant that the Supreme Court stated in State v. Ortega that the outcome in Pierce should remain intact even though the Court adopted an intent element for felony murder. State v. Ortega, 112 N.M. 554, 563, 817 P.2d. 1196, 1205 (1991). Further, in New Mexico cases where the trial court utilized a pre-Ortega instruction after Ortega was decided, the Supreme Court has consistently upheld the conviction where the court found sufficient evidence for the jury to conclude that intent was adequately proven de[illegible]te the erroneous instruction. See, e.g. State v. Livernois, 123 N.M. 128, 934 P.2d. 1057 (1996); State v. Lopez, 122 N.M. 63, 920 P.2d.1019 (1996); State v. Griffin, 116 N.M. 689, 866 P.2d. 1196 (1991). Intent to kill under the Ortega rule includes

"knowledge that the defendant's acts create a strong probability of death or great bodily harm" to the victim. State v. Ortega, 112 N.M. at 563, 817 P.2d. at 1205. The record in this case elaborates sufficient evidence of malice that the jury would have been justified convicting Ms. Pierce on either the deliberate murder or the felony murder instruction, especially considering the extensive testimony regarding Ms. Pierce's state of mind. As intent was adequately proven, whether error was committed was inconsequential to the outcome.

III

Petitioner argues that the imposition of separate sentences for kidnaping and first degree murder violated Ms. Pierce's double jeopardy rights. Petitioner relies on Contreras v. State, 120 N.M. 486, 903 P.2d 228 (1995) holding that when the defendant's conduct is unitary, he or she cannot be convicted of both felony murder and the underlying felony, regardless of whether concurrent or consecutive sentences were imposed. Id. at 491-92, 903 P.2d. at 233-34. The record in this case clearly shows that the kidnaping and the murder committed by Ms. Pierce were separate acts within the unitary conduct analysis. Further, the Supreme Court in Jackson v. State, 122 N.M. 433, 925 P.2d 1195 (1996) held that Contreras should not be applied retroactively but should only be applied to those convictions that were not final when Jackson was decided on August 16, 1995. Id. at 435, 925 P.2d 1197. Petitioner's

appeals were exhausted in 1990, well before Jackson was decided.

IV

Petitioner next contends that the verdict of Guilty But Mentally Ill (GBMI) fundamentally violates a defendant's right to a fair and accurate trial as contained in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and that the verdict subjects the mentally ill defendants to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article II, Sections 14 and 18 of the New Mexico Constitution. Petitioner further contends that there is a common presumption that a verdict of not guilty by reason of insanity means freedom and a verdict of guilty but mentally ill means treatment and confinement. Petitioner argues that because of this presumption, a jury instruction relating to the dispositions of defendants found either not guilty by reason of insanity or GBMI is necessary to guarantee due process of law. In State v. Neely, 112 N.M. 702, 819 P.2d. 249 (1991) the Supreme Court held in direct opposition to Petitioner's claims that the GBMI statute fulfills legitimate state purposes and that the statute does not create jury confusion or compromise. The court in Neely also held that life sentence imposed for first degree murder under the GBMI statute does not subject the defendant to cruel and unusual punishment. 112 N.M. at 708-09, 819 P.24 at 255-56.

In State v. Chambers, the Court held that instructions to the jury on the consequences of an insanity acquittal would inject "an irrelevant" and "improper" issue into their deliberations. 84 N.M. 309, 310 (1970). In Neely, the Court upheld Chambers and further extended its application to the context of the GBMI verdict. 112 N.M. at 710, 819 P.24 at 527. Further, because Petitioner did not raise these constitutional issues on direct appeal, she is barred from asserting such claims in a writ of habeas corpus. See State v. Martinez, 85 N.M. 293, 293, 511 P.2d. 799, 799 (Ct. App. 1973); State v. Hall, 83 N.M. 764, 497 P.2d. 975 (Ct. App. 1972).

V

Finally, Petitioner asserts that defense counsel was ineffective because: (1) they failed to adequately investigate and present Ms. Pierce's insanity defense; (2) they failed to articulate the proper basis for their objection to the court's felony murder instruction; (3) they did not effectively preserve and pursue Ms. Pierce's claim of double jeopardy when the court imposed a separate sentence for kidnaping and first degree murder; and (4) they failed to challenge the constitutionality of New Mexico's guilty but mentally ill statute and failed to ask the trial court to instruct the jury on the consequences of verdicts of not guilty by reason of insanity and GBMI.

Ineffective assistance of counsel claims are analyzed

under the Sixth Amendment standard that defense counsel exercise the skill, judgement and diligence of reasonably competent attorney as determined by the United States Tenth Circuit Court of Appeals in Dyer v. Crisp, 613 F.2d 275, 278 Crisp, 613 F.2d 275,278 (10th Cir.), *cert. denied,* 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 799 (1980). This test was adopted by the New Mexico Supreme Court in State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982). In order to successfully urge her claim, Petitioner must demonstrate that the representation she received at trial fell below the minimum standard of reasonable competence expected of defense attorney in a criminal case. See Orona, 97 N.M. at 234, 638 P.2d at 1079.

The Court finds that Petitioner has failed to demonstrate that counsel was deficient in not attempting to locate the biological mother to assist in its insanity defense or to comfort the emotional state of Ms. Pierce, regardless of how easy she would have been to locate. The difficulty in locating a witness is immaterial when defense counsel makes reasonable strategic choices that such a witness is unnecessary. Strickland v. Washington. 466 U.S. 668, 691, 104 S.Ct. 2052, 2075 (1984) As six experts employed by both the State and the defense examined Ms. Pierce without demanding the missing biological background of the defendant, the lack of an investigation for this material can not be said to be deficient. Further, the Court finds that because of the extensive testimony on the mental state of Ms. Pierce, there is little probability that had the biological

mother been located the outcome of the trial would have been different. A petitioner is denied effective assistance of counsel and entitled to post-conviction relief only where counsel fails to "exercise the skill, judgement and diligence of a reasonably competent defense attorney." Orona, 97 N.M. at 233, 638 P.2d at 1078. The record is clear that counsel made a strategic decision in its endeavor to provide Ms. Pierce an aggressive and competent defense.

The Court also holds that counsel was not ineffective for failure to object to the constitutionality of the alternative deliberate murder instruction and felony murder instruction absent an intent element. Even though the Supreme Court chose not to adopt an intent element for felony murder in State v. Pierce, 109 N.M. 596, 788 P.2d 352 (1990), the Court is satisfied that the defense counsel properly objected to the felony murder instruction and adequately raised the issue on appeal.

As for failure to make the claim of double jeopardy, as stated above, the record shows that Ms. Pierce's conduct was not unitary when carrying out the kidnaping and subsequent murder of the victim. As this argument is inconsistent with the record and would have failed, failure to make such a claim does not constitute ineffective assistance.

Finally, the constitutional claims of due process and cruel and unusual punishment could have been considered on

appeal. By stating that the failure to appeal these issues constitutes ineffective counsel, Petitioner tries to mask substantive issues, improper for post-conviction proceedings, as claims of ineffective counsel. Further, the failure to make tenuous constitutional claims with little hope of success based on precedent is not constitutionally ineffective counsel, but instead saves the Court valuable time and resources.

In conclusion, for the above-stated reasons, Petitioner's writ of habeas corpus is DENIED.

IT IS SO ORDERED.

/s/ Albert S. Pat Murdoch
JUDGE ALBERT S. PAT MURDOCH

Appendix F

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARCI KAYLEEN PIERCE, **Petitioner-Appellant,** **v.** **PENNY LUCERO, Warden, and ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO,** **Respondents-Appellees.**	**No. 99-2219**

ORDER

Filed January 6, 2000

Before **TACHA, McKAY,** and **MURPHY,** Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Randy Johnson
Deputy Clerk